

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAWANN DIXON,	§
	§
Defendant Below-	§ No. 565, 2011D
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0804008973
Plaintiff Below-	§
Appellee.	§

Submitted: February 10, 2012

Decided: March 15, 2012

Before **STEELE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

ORDER

This 15th day of March 2012, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Dawann Dixon, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. Dixon raises a single issue in his opening brief on appeal, which was not raised in the postconviction motion he filed in the Superior Court. The interests of justice do not require us to consider this claim in the first instance. Accordingly, we affirm the Superior Court's denial of postconviction relief.

(2) The record reflects that a Superior Court jury convicted Dixon in 2009 of first degree assault, possession of a firearm during the

commission of a felony, and possession of a firearm by a person prohibited. The Superior Court sentenced Dixon to thirty-eight years at Level V imprisonment, to be suspended after serving ten years for a period of probation. This Court affirmed Dixon's convictions and sentence on direct appeal.¹

(3) Dixon filed his first motion for postconviction relief in the Superior Court in April 2011. Dixon raised three issues in his motion, claiming that: (i) the State failed to prove either that the victim's gunshot wound to his leg created a substantial risk of death or caused serious physical injury or that Dixon had acted recklessly when he shot the victim; (ii) trial counsel was ineffective because he stipulated that the victim had suffered a serious physical injury; and (iii) the trial court committed plain error in not declaring, *sua sponte*, a judgment of acquittal on the first degree assault charge. The Superior Court concluded that Dixon's claims either were procedurally barred or without merit. This appeal followed.

(4) Dixon raises a single issue in his opening brief on appeal. He contends that his trial counsel was ineffective for failing to introduce other statements made by Tosha Hackett, a 9-1-1 caller who did not testify at trial, to the investigating officers in the case. According to Dixon, if Hackett's

¹ *Dixon v. State*, 996 A.2d 1271 (Del. 2010).

other statements had been presented at trial, it would have made clear that Hackett's 9-1-1 call was "testimonial" and thus inadmissible under the Confrontation Clause.

(5) First, we note that Dixon failed to raise any argument in his opening brief challenging the Superior Court's decision with respect to the postconviction claims he raised below. Thus, he has waived any right to review of those claims on appeal.² Moreover, because Dixon failed to raise any argument concerning Hackett's statements in the postconviction motion he filed in the Superior Court, this claim may only be reviewed on appeal for plain error.³

(6) Under the circumstances, we find no reason to justify consideration of Dixon's claim for the first time on appeal. In his direct appeal, Dixon argued that the audiotape of Hackett's 9-1-1 phone call was inadmissible hearsay and violated his constitutional rights under the Confrontation Clause. We rejected Dixon's claims, finding that the 9-1-1 call fell within the excited utterance exception to the hearsay rule and that its admission into evidence did not violate his constitutional right to confront a witness against him.⁴ To the extent that Dixon is attempting to reargue that ruling by recasting the issue as an ineffective assistance of counsel claim, the

² *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

³ *See* Del. Supr. Ct. R. 8 (2012); *DeJesus v. State*, 655 A.2d 1180, 1198 (Del. 1995).

⁴ *Dixon v. State*, 996 A.2d at 1277-78.

Court is not required to reconsider a previously adjudicated claim simply because it has been refined or restated.⁵ Accordingly, consideration of this claim is not warranted in the interests of justice.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁵ *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992).